EXHIBIT A – ORDERS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 278, 279, 280, 281, 282, 370, 371—August Term, 1981

(Argued: October 27, 1981 Decided: April 1, 1982)

Docket Nos. 81-1192, 1195, 1196, 1197, 1203, 1204, 1254

UNITED STATES OF AMERICA,

Appellee,

—against—

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,

Defendants-Appellants.

Before:

MOORE and NEWMAN, *Circuit Judges* and GRIESA,* *District Judge.*

Appeals from judgments of conviction of the District Court of the Southern District of New York (Hon. Lee P. Gagliardi) on various counts of fraud involving financial instruments issued by fictitious off-shore banks. The convictions are affirmed, except as to certain of the counts against defendants Krown and Benjamin which charge the passing of worthless checks in violation of 18 U.S.C. § 1014. The convictions on these counts are reversed on the ground that the statute does not apply to such conduct.

* The Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York, sitting by designation.

CAROLYN HANNEMAN, ESQ., Assistant United States Attorney (John S. Martin, Jr., United States Attorney for the Southern District), *for the Appellee.*

KEVIN KROWN, New York, New York, *Defendant-Appellant Pro Se.*

BARRY M. FALLICK, ESQ., New York, New York (Rochman, Platzer & Fallick), *for Defendant-Appellant Maurice Benjamin.*

THOMAS F. LIOTTI, ESQ., Carle Place, New York, *for Defendant-Appellant Feeney.*

THEODORE KRIEGER, ESQ., New York, New York, *for Defendant-Appellant Rosten.*

JOSEPH P. HOEY, ESQ., Mineola, New York (Suozzi, English, Cianciulli & Peirez, P.C.), *for Defendant-Appellant Rosen.*

BARRY A. BOHRER, ESQ., New York, New York, *for Defendant-Appellant Costanzo.*

GRIESA, *District Judge:*

Kevin Krown, Maurice Benjamin, James Feeney, Henry Rosten, Roger Rosen and Anthony Costanzo appeal from judgments of the District Court for the Southern District of New York, following a five-week jury trial before Hon. Lee P. Gagliardi, convicting each of them on multiple counts of violation of federal anti-fraud statutes.

We affirm the convictions, except that we reverse as to two counts (53 and 54) of the 49 counts on which Krown was convicted, and as to three counts (53, 54 and 55) of the eight

counts on which Benjamin was convicted.[1] Counts 53, 54 and 55 of the indictment charge these defendants with passing worthless checks in violation of 18 U.S.C. § 1014. We hold that this statute is inapplicable to the type of conduct charged.

The proof at trial showed a fraudulent scheme built around two fictitious off-shore banks called First London Bank and Trust Co. and First National Bank of Teheran purportedly located in St. Vincent, West Indies. Large amounts of money were obtained from various victims by the use of fraudulent financial instruments held out as being issued by these banks.

We have considered all the issues raised on appeal, and find that all are without merit except the challenge to the applicability of § 1014.

I.

The facts relevant to this issue are as follows. In November 1978 a company connected with Benjamin purchased certain quantities of meat from a wholesale supplier, one Theresa Amelar. In payment for the first two shipments Benjamin gave Mrs. Amelar two purported certified checks drawn on First National Bank of Teheran ("FNBT") in the amounts of $15,000 and $45,000.

Mrs. Amelar deposited these checks in her account at Marine Midland Bank. Marine Midland put these checks into the federal clearinghouse system for collection. They were promptly returned to Marine Midland stamped "No Such Bank." Mrs. Amelar informed Benjamin of this. Benjamin said to have Marine Midland mail the checks directly to St. Vincent for collection. Accordingly, the checks were resubmitted to Marine Midland, which mailed them to St. Vincent.

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[1] Krown was sentenced to 15 years imprisonment and was fined a total of $86,000. Benjamin was sentenced to 6 years imprisonment and was fined a total of $29,000. The partial reversals as to Krown and Benjamin will not reduce their terms of imprisonment. However, Krown's fines will be reduced by $10,000 ($5,000 on each of the two reversed counts), and Benjamin's fines will be reduced by $15,000 ($5,000 on each of the three reversed counts).

While this process was going on, Benjamin placed an order with Mrs. Amelar for a third shipment of meat. This order was filled, and Benjamin gave Mrs. Amelar a third purported certified check drawn on FNBT. This check was for $29,919.32, and was deposited with Mrs. Amelar's account at Marine Midland, which mailed the check directly to St. Vincent for collection.

Later, Benjamin obtained a genuine Bankers Trust Company certified check for $15,000. He sent it directly to Marine Midland for deposit in Mrs. Amelar's account. This was done in order to make it appear to Mrs. Amelar that the original $15,000 FNBT check had been honored.

Ultimately, of course, Marine Midland's efforts to collect the three checks from FNBT were fruitless. Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookkeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks.

It does not appear that Krown participated directly in the dealings with Mrs. Amelar, although it was he who "created" the fictitious FNBT.

Marine Midland Bank is a bank whose deposits are insured by the Federal Deposit Insurance Corporation.

II.

Section 1014 provides in pertinent part:

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by

renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Judge Gagliardi charged the jury on the elements which needed to be proved for conviction on the § 1014 counts:

"The essential elements which must be proved in order to establish this offense against any defendant are:

1. That the defendant in question knowingly made, caused to be made or aided and abetted the making of the false statement or overvaluation concerning a material fact;

2. That the statement was made for the purpose of influencing the bank's action with respect to an application or advance, commitment or loan;

3. That the bank was insured by the FDIC."

In his explanation of the term "overvaluation" in the first element, the judge made it clear that he was referring to the overvaluation of security within the language of § 1014, and stated to the jury that a check, about which a false statement has been made as to its value, would be an overvalued security.

Thus, under the trial judge's instruction, the jury was permitted to find Benjamin and Krown guilty under § 1014, if the jury found that they made or caused to be made a false statement or overvaluation of security which had the purpose of influencing a bank upon an advance, loan, application or commitment.

An initial question is whether the statute is limited to frauds committed directly against the financial institutions referred to in the statute. Benjamin's fraud was directed primarily against Mrs. Amelar. Benjamin did not deal directly with Marine Midland, except in the one instance when he sent the $15,000 Bankers Trust check for deposit in her account.

The statute is not limited by its terms to direct dealings with banks. It covers the making of false statements "for the purpose of influencing in any way" the action of an FDIC insured bank upon certain types of transactions. Thus, the statute is broad enough to apply to fraudulent dealings with third persons where it could *also* be said that there was the purpose to influence a bank upon one of the transactions named in the statute.

In the present case, when Benjamin gave the first two FNBT checks to Mrs. Amelar, he must have known that she would deposit these checks in a bank. After Mrs. Amelar told Benjamin about the problem with the checks, Benjamin's suggestion to have Marine Midland send the checks directly to St. Vincent was designed to prolong the bank's collection process in order to gain time for further fraudulent dealings with Mrs. Amelar. With regard to the third FNBT check, Benjamin intended that the check be deposited in the bank and that the bank would undertake collection via mail to St. Vincent. Benjamin's deposit of the Bankers Trust check at Marine Midland was an additional act intended to maintain a facade of regularity in his dealings with Mrs. Amelar.

Thus Benjamin was using Marine Midland to facilitate his fraud against Mrs. Amelar. In terms of the statute, it can be said that he had "the purpose of influencing" Marine Midland to accept the certified checks for deposit in Mrs. Amelar's account and to process those checks for collection over as long a time as possible.

This brings us to the issue of whether the certified FNBT checks were false statements or overvalued security within the meaning of § 1014, and the further issue of whether Benjamin had the purpose of influencing the bank in connection with an advance, loan, application or commitment.

It would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could,

under certain circumstances, constitute overvalued security for an advance, loan or commitment.

However, there is no basis in the evidence for a finding that Benjamin had the purpose of influencing the bank to use the FNBT checks in connection with an advance, loan, application or commitment. The interpretation of these terms in the statute has produced a split in the circuit decisions. The Fifth Circuit has held that the deposit of worthless checks in a bank and subsequent withdrawal of funds based upon those checks, can constitute an advance or loan within the meaning of § 1014. *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3375 (Nov. 10, 1981) (No. 80-2116); *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Both of these cases involved check kiting schemes. The theory of these decisions is that the banks granted immediate credit to the depositors by permitting withdrawals from the account prior to the collection of the deposited checks, and that such immediate credit was an advance or loan. The Third Circuit, declining to follow the *Payne* and *Williams* decisions, has held § 1014 inapplicable to a check kiting scheme. *United States v. Sher*, 505 F. Supp. 858 (W.D. Pa.), *aff'd per curiam*, 657 F.2d 28, *reh'g en banc denied*, 661 F.2d 34 (3d Cir. 1981). The *Sher* decision relied upon the reasoning in *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). The Third Circuit cases express concern about the possibility that an expansive reading of § 1014 will make that statute a general criminal remedy against the passing of worthless checks, contrary to Congressional intent.

We agree that § 1014 is not designed to have general application to the passing of worthless checks, and that the language of the statute, limiting it to the specified credit transactions, must be given effect. The Second Circuit has warned against construing § 1014 in such a manner as to transform what would normally be state criminal offenses into federal crimes. *United States v. Sabatino*, 485 F.2d 540, 543 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

It is unnecessary for us to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. Also, it is unnecessary for us to decide whether the granting of immediate credit by a bank, in the form of permitting a withdrawal of funds prior to the collection of a deposited check, constitutes an advance or loan within the meaning of § 1014. In the present case there was no such granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014.

Not only was there in fact no advance or loan to Mrs. Amelar, but there is no evidence that Benjamin had the purpose of influencing the bank in connection with an advance or loan. The mere intent to have the bank accept the certified checks for deposit and carry out collection procedures is not sufficient to violate the statute.

It is equally true that there was no "application" or "commitment," or any evidence of a purpose by Benjamin to cause such. These broad terms must be interpreted with reference to the statute as a whole, and can only refer to an application or commitment involving an advance or loan or other credit transaction listed in the statute. *See United States v. Pavlick*, 507 F. Supp. 359, 362 (M.D. Pa. 1980). The case relied upon by the Government for the proposition that there was a commitment in the present case, *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978), is distinguishable. That case involved an agreement by a bank to

permit a withdrawal from an account following a fraudulent representation to the bank by the depositor.

For the foregoing reasons Benjamin's conviction on the § 1014 counts cannot stand. The convictions of Krown on these counts must also fall, since Krown's liability could only derive from that of Benjamin.

The convictions are affirmed, except as to Counts 53 and 54 against Krown and Counts 53, 54 and 55 against Benjamin. As to these counts, we reverse and remand with directions to enter judgments of dismissal.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of June, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,
Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
JUN 16 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Nos. 81-1192, 81-1195, 81-1196, 81-1197, 81-1203
81-1204, 81-1254

Petitions for rehearing containing suggestions that the actions be reheard in banc having been filed herein by counsel for the defendants-appellants, Anthony Costanzo, James Feeney, Henry Rosten and Roger Rosen, and by the defendant-appellant, Anthony Costanzo, pro se,

Upon consideration by the panel that heard the appeals, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeals and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by: s/ Francis X. Gindhart
Francis X. Gindhart
Chief Deputy Clerk

82-5252

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

HENRY ROSTEN,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

S I R S:

Petitioner, HENRY ROSTEN, moves this Court for an Order permitting him to file a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit from the judgment entered therein on April 1, 1982, a petition for a rehearing having been denied on June 16, 1982, in forma Code, Section 1915, and in support thereof submits the annexed affidavit and exhibits.

Dated: New York, New York
July 20, 1982

Yours, etc.

THEODORE KRIEGER
Attorney for Petitioner
Office & P.O. Address
132 Nassau Street
New York, N.Y. 10038
(212) DI 9-3900

TO: SOLICITOR GENERAL OF THE UNITED STATES
Department of Justice
Washington, D.C.

(over)

United States Attorney
Southern District of new york
One St. Andres Plaza
New York, N.Y., 10007

United States Supreme Court
Washington, D.C., 20543

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

HENRY ROSTEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

State of New York)
) ss.:
County of New York)

THEODORE KRIEGER, being duly sworn, deposes and says:

1. That the petitioner, Henry Rosten, has been heretofore adjudicated to be an indigent and thereafter your deponent was, pursuant to the Criminal Justice Act, assigned to represent him in the United States District for the Southern District of New York.

2. That pursuant to an Order of the United States Court of Appeals for the Second Circuit, a copy of which is attached hereto and designated as "Exhibit A", the aforesaid assignment of ypur deponent as counsel for the petitioner was continued by the Court of Appeals.

3. That your deponent is not aware of any fact or circumstance which has in any fashion affected the initial and continuing determination as to the petitioner's indigency.

4. That the petitioner, who has been heretofore sentenced to serve a term of imprisonment of fifteen (15) months, was thereupon released on a personal recognizance bond.

5. That the petitioner was convicted after a jury trial of the crimes of conspiring to and substantively violate 18 U.S.C. 371, 1341 and 1343, arising from the alleged commission of wire, mail and bank frauds.

6. That the judgment of conviction was affirmed by an Order and Opinion dated April 1, 1982, a copy of which is attached hereto and designated as "Exhibit B".

7. That an application for a rehearing in banc was made and denied in June 16, 1982, a copy of which is attached hereto and designated as "Exhibit C".

8. that your deponent will file a Petition for a Writ of Certiorari to this Court predicated upon the contention that the petitioner was deprived of his right to due process of law as guarantee him under the Fifth.

9. That the Court of Appeals did not respond to the petitioner's pivotal point that it should, in camera, examine the data impounded by the District Court relative to any involvement of the Central Intelligence Agency with the co-defendant Kevin Barry Krown, First London Bank and Trust Company, and/or The First National Bank of Tehran, S.&K, save as to an omnibus statement that all issues raised on appeal were without merit except the challenge to the applicability of 18 U.S.C. 1014.

10 That it is respectfully submitted that the refusal of the Court of Appeals to rule upon this issue which may contain exculpatory material as set forth under Brady v Maryland, 373 U.S. 83 (1963) was error.

11. That your deponent submits that the petition is meritorious, worthy of appellate consideration and in no way frivolous.

WHEREFORE, the finding of indigency having previously been made by the United States District Court for the Southern District of New York and continued by the United States Court of Appeals for the Second Circuit. It is submitted that the instant application for leave to appeal in forma pauperis should be granted, for all of which no prior application has been made to this Court or any Justice thereof.

Sworn to before me this
29th day of July, 1982.

Bernard P. Rose

BERNARD P. ROSE
NOTARY PUBLIC, State of New York
No. 41-8039225
Qualified in Queens County
Commission Expires March 30, 19 84

Theodore Krieger

Theodore Krieger
Attorney for Petitioner
132 Nassau Street
New York, New York 10038
(212) DI-9-3900

FOR THE SECOND CIRCUIT EXHIBIT A

Erna Carotenuto
(212) 791-0105

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROGER ROSEN, JAMES W. FEENEY, ANTHONY COSTANZO, KEVIN BARRY KROWN, HENRY ROSTEN, MAURICE BENJAMIN,

Defendants-Appellants

CRIMINAL APPEAL
SCHEDULING ORDER #1

Docket Nos. 81-1192-Rosen
81-1195-Feeney
81-1196-Costanzo
81-1197-Krown
81-1203-Rosten
81-1204-Benjamin
81-1254-Krown

81-1192

The court having continued Theodore Krieger, Esq. as counsel for the appellant Henry Rosten, Thomas F. Liotti, Esq. as counsel for the appellant James W. Feeney, Barry A. Bohrer, Esq. as counsel for the appellant Anthony Costanzo pursuant to the Criminal Justice Act; and

The court noting that Joseph P. Hoey, Esq. is counsel for the appellant Roger Rosen, Barry Fallick, Esq. is counsel for the appellant Maurice Benjamin and that their respective docketing fees paid to the Clerk of the District Court within 10 days after the filing of their respective notices of appeal; and

The Court noting that Kevin Barry Krown is appealing Pro Se; and

It further noting that notices of appeal by the defendants-appellants have been filed beginning May 17, 1981 and the last one June 15, 1981; and

It further noting that Barry Fallick, Esq. and Theodore Krieger, Esq. have expressed their willingness to be lead and associate lead counsel for the defendants-appellants in this Court; now

IT IS HEREBY ORDERED that Barry Fallick, Esq. and Theodore Krieger, Esq. are appointed lead and associate lead counsel respectively; and

IT IS FURTHER ORDERED that the court reporter shall file with the Clerk of the District Court within 30 days from receipt of the transcript order those transcripts ordered pursuant to F.R.A.P. Rule 10 (b)(1). Any motions by the court reporter to extend the time to file the transcripts shall be made not less than 7 days before the transcripts are due, unless exceptional circumstances exist.

IT IS FURTHER ORDERED that counsel shall forward a copy of any amendment, correction, or supplement to the initial transcript order to this court and to the Clerk of the District Court forthwith.

IT IS FURTHER NOTED that the record on appeal has been filed on June 16, 1981;

IT IS FURTHER ORDERED that the appellants' may, without further order of the court, remove the record for purposes of preparation of the appellants' brief(s) and joint appendix provided that the record is returned to the custody of the court on or before the date set for filing the appellants' brief(s); and

IT IS FURTHER ORDERED that appointed counsel for the respective defendants-appellants shall serve and file xerographic copies of their brief(s) and appendix; and

IT IS FURTHER ORDERED that retained counsel shall serve and file their brief(s) and appendix and that they may be produced in the form authorized by F.R.A.P. Rule 32(a); and

IT IS FURTHER ORDERED that ten (10) copies of all defendants-appellants brief(s) and JOINT APPENDIX be served and filed on or before August 10, 1981, default of which their respective appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that the appendix, in addition to whatever else it includes, shall include copies of the district court docket entries, the indictments, the District Court's charge(s), the judgment(s) of convictions and opinion(s) of the District Court; and

IT IS FURTHER ORDERED that the United States shall serve and file ten (10) copies of its brief on or before September 9, 1981 and that it may be produced in the form authorized by F.R.A.P. Rule 32(a), except that a response to a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967) shall be served and filed in lieu if a brief by not later than August 24, 1981.

IT IS FURTHER ORDERED that counsel for each of the defendants-appellants shall cooperate with counsel for all other defendants-appellants to carry out the purpose and intent of F.R.A.P. Rule 28(i) so as to coordinate the legal issues which they wish to raise and insofar as possible join in a single brief on such issues and avoid duplication with respect thereto and that for these purposes lead and associate lead counsel shall coordinate the taking of as many steps in this direction as practicable; and

IT IS FURTHER ORDERED that any counsel proceeding pursuant to the Criminal Justice Act shall submit a completed voucher (CJA-20) by not later than five (5) days after the filing of the appellee's response; and

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of September 21, 1981, except that an appeal in which an Anders brief has been filed shall be ready to be heard immediately following the receipt of the response of the appellee.

IT IS FURTHER ORDERED that motions for extension of time will not be granted absent most extraordinary circumstances.

Dated: June 30, 1981

A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

"Exhibit B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Ultimately, of course, Marine Midland's efforts to collect the three checks from FNBT were fruitless. Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookkeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks.

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renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Judge Gagliardi charged the jury on the elements which needed to be proved for conviction on the § 1014 counts:

"The essential elements which must be proved in order to establish this offense against any defendant are:

1. That the defendant in question knowingly made, caused to be made or aided and abetted the making of the false statement or overvaluation concerning a material fact;

2. That the statement was made for the purpose of influencing the bank's action with respect to an application or advance, commitment or loan;

3. That the bank was insured by the FDIC."

In his explanation of the term "overvaluation" in the first element, the judge made it clear that he was referring to the overvaluation of security within the language of § 1014, and stated to the jury that a check, about which a false statement has been made as to its value, would be an overvalued security.

Thus, under the trial judge's instruction, the jury was permitted to find Benjamin and Krown guilty under § 1014, if the jury found that they made or caused to be made a false statement or overvaluation of security which had the purpose of influencing a bank upon an advance, loan, application or commitment.

An initial question is whether the statute is limited to frauds committed directly against the financial institutions referred to in the statute. Benjamin's fraud was directed primarily against Mrs. Amelar. Benjamin did not deal directly with Marine Midland, except in the one instance when he sent the $15,000 Bankers Trust check for deposit in her account.

The statute is not limited by its terms to direct dealings with banks. It covers the making of false statements "for the purpose of influencing in any way" the action of an FDIC insured bank upon certain types of transactions. Thus, the statute is broad enough to apply to fraudulent dealings with third persons where it could *also* be said that there was the purpose to influence a bank upon one of the transactions named in the statute.

In the present case, when Benjamin gave the first two FNBT checks to Mrs. Amelar, he must have known that she would deposit these checks in a bank. After Mrs. Amelar told Benjamin about the problem with the checks, Benjamin's suggestion to have Marine Midland send the checks directly to St. Vincent was designed to prolong the bank's collection process in order to gain time for further fraudulent dealings with Mrs. Amelar. With regard to the third FNBT check, Benjamin intended that the check be deposited in the bank and that the bank would undertake collection via mail to St. Vincent. Benjamin's deposit of the Bankers Trust check at Marine Midland was an additional act intended to maintain a facade of regularity in his dealings with Mrs. Amelar.

Thus Benjamin was using Marine Midland to facilitate his fraud against Mrs. Amelar. In terms of the statute, it can be said that he had "the purpose of influencing" Marine Midland to accept the certified checks for deposit in Mrs. Amelar's account and to process those checks for collection over as long a time as possible.

This brings us to the issue of whether the certified FNBT checks were false statements or overvalued security within the meaning of § 1014, and the further issue of whether Benjamin had the purpose of influencing the bank in connection with an advance, loan, application or commitment.

It would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could,

under certain circumstances, constitute overvalued security for an advance, loan or commitment.

However, there is no basis in the evidence for a finding that Benjamin had the purpose of influencing the bank to use the FNBT checks in connection with an advance, loan, application or commitment. The interpretation of these terms in the statute has produced a split in the circuit decisions. The Fifth Circuit has held that the deposit of worthless checks in a bank and subsequent withdrawal of funds based upon those checks, can constitute an advance or loan within the meaning of § 1014. *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3375 (Nov. 10, 1981) (No. 80-2116); *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Both of these cases involved check kiting schemes. The theory of these decisions is that the banks granted immediate credit to the depositors by permitting withdrawals from the account prior to the collection of the deposited checks, and that such immediate credit was an advance or loan. The Third Circuit, declining to follow the *Payne* and *Williams* decisions, has held § 1014 inapplicable to a check kiting scheme. *United States v. Sher*, 505 F. Supp. 858 (W.D. Pa.), *aff'd per curiam*, 657 F.2d 28, *reh'g en banc denied*, 661 F.2d 34 (3d Cir. 1981). The *Sher* decision relied upon the reasoning in *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). The Third Circuit cases express concern about the possibility that an expansive reading of § 1014 will make that statute a general criminal remedy against the passing of worthless checks, contrary to Congressional intent.

We agree that § 1014 is not designed to have general application to the passing of worthless checks, and that the language of the statute, limiting it to the specified credit transactions, must be given effect. The Second Circuit has warned against construing § 1014 in such a manner as to transform what would normally be state criminal offenses into federal crimes. *United States v. Sabatino*, 485 F.2d 540, 543 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

It is unnecessary for us to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. Also, it is unnecessary for us to decide whether the granting of immediate credit by a bank, in the form of permitting a withdrawal of funds prior to the collection of a deposited check, constitutes an advance or loan within the meaning of § 1014. In the present case there was no such granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014.

Not only was there in fact no advance or loan to Mrs. Amelar, but there is no evidence that Benjamin had the purpose of influencing the bank in connection with an advance or loan. The mere intent to have the bank accept the certified checks for deposit and carry out collection procedures is not sufficient to violate the statute.

It is equally true that there was no "application" or "commitment," or any evidence of a purpose by Benjamin to cause such. These broad terms must be interpreted with reference to the statute as a whole, and can only refer to an application or commitment involving an advance or loan or other credit transaction listed in the statute. *See United States v. Pavlick*, 507 F. Supp. 359, 362 (M.D. Pa. 1980). The case relied upon by the Government for the proposition that there was a commitment in the present case, *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978), is distinguishable. That case involved an agreement by a bank to

permit a withdrawal from an account following a fraudulent representation to the bank by the depositor.

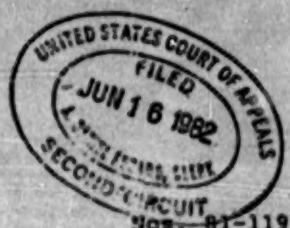
For the foregoing reasons Benjamin's conviction on the § 1014 counts cannot stand. The convictions of Krown on these counts must also fall, since Krown's liability could only derive from that of Benjamin.

The convictions are affirmed, except as to Counts 53 and 54 against Krown and Counts 53, 54 and 55 against Benjamin. As to these counts, we reverse and remand with directions to enter judgments of dismissal.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

"EXHIBIT C"

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of June, one thousand nine hundred and eighty-two.



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,

Defendants-Appellants.

Nos. 81-1192
81-1195
81-1196
81-1197
81-1203
81-1204
81-1254

Petitions for rehearing containing suggestions that the actions be reheard in banc having been filed herein by counsel for the defendants-appellants, Anthony Costanzo, James Feeney, Henry Rosten and Roger Rosen, and by the defendant-appellant, Anthony Costanzo, pro se,

Upon consideration by the panel that heard the appeals, it is ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeals and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

Francis X. Gindhart

Francis X. Gindhart
Chief Deputy Clerk